IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5920

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SUPREME COURT, U.S.

MICHAEL V. COSTELLO, and
ROBERTO K. CELESTINEO, and
others similarly situated,

Petitioners,

-v-.

LOUIS L. WAINWRIGHT, Director
of the Division of Corrections,
State of Florida, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IV

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-

MICHAEL V. COSTELLO, and
ROBERTO K. CELESTINEO, and
others similarly situated,

Petitioners,

-v-

LOUIS L. WAINWRIGHT, Director
of the Division of Corrections,
State of Florida, et al.,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 27, 1976.

OPINIONS BELOW

1. Two orders of the district court, which appointed the United States as amicus curiae in the case, and which appointed an expert medical survey team as special masters are reported respectively at 353 F.Supp. 1324 (Dec. 6, 1972) and 387 F.Supp. 324 (July 16, 1973); appendix infra pp. 1a-2a and 3a-7a.

2. The opihion of the United States District Court for the Middle District of Florida, dated May 22, 1975 is reported at 397 F.Supp. 20; appendix infra pp. 8a-28a.

3. The Findings and Conclusions of the District Court entered on June 27, 1975, following a limited remand from the Court of Appeals to determine the capacity of Florida to carry out the preliminary injunction is unreported. See appendix infra pp. 29a-47a.

4. The opinion of a panel of the United States Court of Appeals for the Fifth Circuit, dated January 15, 1976 is reported at 525 F.2d 1239; appendix infra pp. 48a-63a.

5. The en banc opinion of the United States Court of Appeals for the Fifth Circuit, dated September 27, 1976 is reported at 539 F.2d 547; appendix infra pp. 64a-71a.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 27, 1976; appendix infra p. 72a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Must an injunction which orders state officials to relieve overcrowding of Florida prisons to protect inmates' Eighth and Fourteenth Amendment rights be issued by a three judge court convened under 28 U.S.C. §2281, where the relief ordered arguably may force corrections officials to disregard state laws in order to comply with the Constitution, but the merits of the case do not involve the constitutionality of such state statutes and their validity was never questioned or decided.

2. Where Congress has repealed 28 U.S.C. §2281, but has provided that the repeal "shall not apply to any action

commenced on or before the date of enactment", does the principle that a court should apply the law in effect at the time it renders its decision preclude the convening of a new three judge court at the remedy stage of a long pending suit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following federal statutes:

a. 28 U.S.C. §2281: Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

b. Public law 94-381, August 12, 1976; 90 Stat. 1119:

An Act to improve judicial machinery by amending the requirement for a three-judge court in certain cases and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2281 of title 28, United States Code, is repealed.

Sec. 2. That section 2282 of title 28, United States Code, is repealed.

Sec. 3. That section 2284 of title 28, United States Code, is amended to read as follows:

"2284. Three-judge court; when required; composition; procedure

"(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

"(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

"(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.

"(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment."

Sec. 4. The analysis of chapter 155 of title 28, United States Code, is amended to read as follows:

"Sec.
"2281. Repealed.
"2282. Repealed.
"2283. Stay of State court proceedings.
"2284. Three-judge district court; when required; composition; procedure."

Sec. 5. (a) Section 2403 of title 28, United States Code is amended --

(1) by inserting the subsection "(a)" immediately before "In" and

(2) by adding at the end thereof the following new subsection:

"(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party,

wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.".

(b)The catchline to section 2403 of title 28, United States Code, is amended to read as follows:

"§2403. Intervention by United States or a State; constitutional question".

Sec. 6. Item 2403 of the analysis of chapter 161, of title 28, United States Code, is amended to read as follows:

"2403. Intervention by United States or a State; constitutional question".

Sec. 7. This Act shall not apply to any action commenced on or before the date of enactment.

Approved August 12, 1976.

3. The case involves the following Florida statutes:

a. Section 839.21 Refusal to receive prisoner

Any jailer or other officer, who willfully refuses to receive into the jail or into his custody a prisoner lawfully directed to be committed thereto on a criminal charge or conviction, or any lawful process whatever, shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083. (Laws 1971, c. 71-136, §1031)

b. Section 944.16: Prisoners: how received

All prisoners shall be delivered to the custody of the division at such reception and classification centers as shall be provided for this purpose. No prisoner shall be received by the division, unless the sheriff, United States marshal, or other officer having such prisoner in charge, shall also deliver a commitment in due form issued by authority of the court committing such prisoners. (Laws 1969, c. 69-106, §§ 19,35.)

c. Section 944.29: Extra good time allowances

The division may allow, in addition to time credits, an extra good time allowance for meritorious conduct or exceptional industry. (Laws 1969, c. 69-106, §§ 19, 35.)

d. Section 944.291: Prisoner released by reason of gain time allowances

(1)(a) A prisoner who has served his term or terms, less allowable statutory gain time deductions and extra good time allowances as provided by law, shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was actually sentenced or such lesser time as may be determined by the Florida parole and probation commission pursuant to §947.13.

(b) The provisions of this section shall not apply to prisoners who have not earned at least one hundred eighty days' gain time.

(2) A prisoner so released shall be under the supervision and control of the parole and probation commission in accordance with the appropriate provisions of Chapter 947, pertaining to paroles and parolees and their supervision, disposition, and control. (Laws 1967, c. 67-421, § 1.)

e. Section 945.09: Commitment of prisoners; classification; Reception and Classification Center; transfer

All prisoners sentenced to the state penitentiary shall be committed by the court to the custody of the division and shall be conveyed in the manner provided by law to such institution in the correctional system as the division shall direct. The division shall establish a Reception and Classification Center for male prisoners at Lake Butler. The division shall provide reception and classification facilities for female prisoners at the Florida Correctional Institution at Lowell. Classification facilities shall be provided in the discretion of the division at all institutions in the correctional system. Pursuant to such regulations as the division may provide, the division is authorized to transfer prisoners from one institution to another institution in the correctional system and to reclassify prisoners as circumstances may require. (Laws 1969, c. 69-106, §§ 19, 35.)

f. Section 945.091: Extend the limits of confinement

(1) The division is authorized to adopt regulations permitting the extension of the limits of the place of confinement of an inmate as to whom there is reasonable cause to believe he will honor his trust by authorizing him, under prescribed conditions and following investigation and approval by the director, who shall maintain a written record of such action and forward a copy of his approval to the parole and probation commission, to leave the confines of that place unaccompanied by a custodial agent for a prescribed period of time to:

(a) Visit, for a specified period, a specifically designated place or places for the purpose of visiting a dying relative, attending the funeral of a relative, or arranging for employment or for a suitable residence for use when released, to otherwise aid in the rehabilitation of the inmate, or for another compelling reason consistent with the public interest, and return to the same or another institution or facility designated by the division of corrections; or

(b) Work at paid employment, participate in education or a training program, or voluntarily serve a public or nonprofit agency in the community while continuing as an inmate of the institution or facility in which he shall be confined except during the hours of his employment, education, training or service and traveling thereto and therefrom. Inmates shall participate in paid employment only during the last twelve months of their confinement unless sooner requested by the parole and probation commission.

(2) The division may adopt regulations as to the eligibility of inmates for this extension of confinement, the disbursement of any earnings of these inmates, or the entering into of agreements between the division and any city or county or federal agency for the housing of these inmates in a local place of confinement.

(3) The willful failure of an inmate to remain within the extended limits of his confinement or to return within the time prescribed to the place of confinement designated by the division shall be deemed as an escape from the custody of the division and shall be punishable as prescribed by law.

(4) The parole and probation commission is authorized to make investigations and recommendations pertaining to the validity of requests for visits by inmates, community attitudes towards

inmates, and job opportunities for inmates and to otherwise assist the division when requested in the implementation of the program herein authorized. (Laws 1971, c. 71-112, § 1.)

STATEMENT OF THE CASE

This is a suit by prisoners in the Florida prison system who complain that they have been subjected to cruel and unusual punishment by the deprivation of medical care. The case began with two handwritten prisoner complaints in the United States District Court for the Middle District of Florida in February 1972. The Middle District has more pending prisoner civil rights cases than any other district court in the nation; 1,049 pending cases in the Middle District out of 6,341 in the entire country as of June 30, 1976.[1] When complaints were filed by Roberto Celestineo and Michael Costello, District Judge Scott consolidated the cases, granted forma pauperis status, and appointed Tobias Simon, Esq., as plaintiffs' counsel.[2] Also the United States was appointed to represent the public interest as amicus curiae with the right to present evidence. 353 F. Supp. 1324.

The Second Amended Complaint, alleged jurisdiction in the district court under 28 U.S.C. §1343, to protect plaintiffs'

1/ 1976 Annual Report of the Director, Administrative Office of the United States Courts, p. I-21, Table C 3A. (Hereafter cited as "1976 Annual Report of the Director".)

2/ When the case was subsequently certified as a class action, Mr. Simon was also appointed to represent the class. Mr. Celestineo has been recently released on parole; Mr. Costello remains in prison.

rights under 42 U.S.C. §1983, and the Eighth and Fourteenth Amendments to the Constitution of the United States. The district court certified a class action on behalf of "all those persons who are now or hereafter will be committed to the custody of the defendant". The defendants are the Director of the Division of Corrections and the Director of the Division of Mental Health.[3] Plaintiffs were denied leave to add the members of the Florida Parole and Probation Commission on April 24, 1973.[4]

The Second Amended Complaint alleged inter alia that prisoners were denied access to medical facilities and personnel when seriously ill, and were denied the basic elements of adequate medical treatment; that the prison medical facilities were grossly understaffed, the medical plants and equipment were inadequate, and the administration of medical programs was shoddy; that overcrowding of the prisons was so severe (with 10,500 prisoners in a system designed for a maximum of 7500) as to damage the health of the prisoners and dilute the medical care system. The relief sought was an injunction requiring the defendants to redistribute or reduce the prison population to a level which does not "exacerbate the unhealthy conditions", and requiring them to provide basic medical care.

In February 1973 plaintiffs filed a motion for a preliminary injunction to curb overcrowding of the prison system, but the

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3/ For a more detailed description of the defendants, see the opinion below 539 F.2d at 548, note 1.

4/ Id.

application was denied without prejudice when the defendant Wainwright took administrative action to close the prisons to new inmates. On February 20, 1973, the District Court ordered the defendants to prepare a plan to reduce the number of inmates and/or improve facilities so as to enable them to provide a minimally adequate level of medical care. When Mr. Wainwright rescinded his order closing the prisons, plaintiffs on March 2, 1973 renewed their application for a preliminary injunction. The motion was denied on April 24, 1973. In July 1973, the District Court noting that Mr. Wainwright "has, without qualification, also advised this Court that the Division of Corrections is not providing adequate medical care and services to the prisoners under its jurisdiction" appointed a medical survey team led by Dr. Kenneth B. Babcock, along with Dr. Joseph Alderete and others as special masters.[5] 387 F.Supp. 324. The District Court stated that the "gist" of the Babcock report, which was filed December 19, 1973, "was that there existed gross systemic deficiencies in the delivery of adequate medical care to the inmates of the Division of Corrections, which deficiencies could be remedied by certain specific measures outlined in the report." 397 F.Supp. at 23. The defendants' response filed May 28, 1974 "concurred generally with the findings of the Babcock Commission Report and the remedies proposed therein." 397 F.Supp. at 23.

On January 13, 1975, the parties filed a lengthy Amended Pre-trial Stipulation. They stipulated that "plaintiffs have a right to adequate medical treatment and care"; that "'a

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5/ Their expert qualifications are described in the district court opinion. 397 F.Supp. at 23, notes 1, 2.

deprivation of basic elements of adequate medical treatment' constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments"; that "the due process clause requires that minimally adequate treatment be in fact provided"; that plaintiffs "are not receiving such medical treatment as would be required by guidelines based upon the Babcock Report for the availability of mental and physical health care and treatment"; and that the "Babcock Commission Report as modified by the Response of the Division of Corrections describes necessary improvements to the delivery of medical services within the prison system which, if implemented, would either: (A) Create guidelines for adequate medical care (Defendants' position) or (B) Be a major factor in meeting minimal constitutional standards (Plaintiffs' position)." 397 F.Supp. at 24.

The parties also stipulated to the link between severe overcrowding in the prisons and the denial of adequate health care:

"[Stipulation] VI-C. CAPACITY OF FACILITIES.

"The parties recognize that the normal capacity of the existing prison system should be limited to 9,313 persons; that even using temporary facilities and operating under conditions of extreme emergency, the capacity of the existing system should not be stretched beyond 10,535; and nevertheless, the number of persons committed to the custody of the DIVISION OF CORRECTIONS, as of September 30, 1973, was 11,521 or 986 over emergency capacity; that because of the temporary cessation of intake -- by reason of this overcrowding of inmates -- there is a backlog in the 67 jails of Florida in excess of 300; and that an additional 600 inmates are expected within the next 90 days.

"In brief, there is, in the custody of the DIVISION OF CORRECTIONS, 3,130 persons over normal capacity limitations and 1,908 persons over emergency capacity limitations.

"The parties recognize that severe overcrowding may be injurious to the physical and mental health of the plaintiffs and such overcrowding should be eliminated. (See VI-E, infra.)

The parties further stipulated that "any plan for improvement of medical care and treatment comparable to the Babcock Commission standards would be sufficient and acceptable."[5a/]

Notwithstanding the Babcock Report and its seeming acceptance by the defendants, and the stipulation that overcrowding was injurious to the inmates' health and "should be eliminated," the Court in April and May 1975 conducted a trial.[6/] The Court made extensive detailed findings on the "uncontroverted expert medical opinion"[7/] about the link between the overcrowding and the denial of adequate health care. See 397 F.Supp. at 24-31. Judge Scott's summary of his findings was that:

> ". . . the overwhelming evidence is that there is a direct and immediate correlation between severe overcrowding, as now exists in the Florida Prison System, and the deprivation of minimally adequate health care. In addition, it appears that severe overcrowding endangers the very lives of the inmates because of its being a factor in the causation of violence within the prison system. [9]
>
> "9/ The inmate population in the Florida Prison System has increased as follows since 1971:

5a/ The stipulation disclaimed an Agreement to implement the Babcock recommendations per se: "While the parties recognize the Babcock Commission standards, neither the Defendants nor the Legislature is bound to any particular course of action." The Defendants also preserved in the stipulation their objection to the jurisdiction of the Court and their right to appeal any order of the court.

6/ The trial was held April 21-23, and May 12-14, 1975, and then recessed for further proceedings at a later date. The preliminary injunction was issued May 22, 1975. On April 21, 1975, Plaintiffs again renewed their motion for an injunction to deal with overcrowding.

7/ The evidence on the harmful effects of overcrowding on prisoners' health is set out at 397 F.Supp. at 24-31. Physicians employed by the defendants testified to the problem. Indeed, Mr. Wainwright himself testified about the danger to prisoners' health from overcrowding: "Q. Do you regard the over-crowded conditions as a danger to the health of the prisoners in each of these institutions? -A. I think I would have to say yes." 397 F.Supp. at 30.

"June 30, 1971 9,530
June 30, 1972 10,112
June 30, 1973 10,346
June 30, 1974 11,335
March 31, 1975 12,748
May 2, 1975 13,046
May 12, 1975 approximately 13,700.
Emergency capacity on May 12, 1975 was 11,105 inmates (with the recent addition of 600 beds)."

Judge Scott personally viewed the Lake Butler Reception and Medical center. He saw four inmates in a seven foot by seven foot cell, with one man in a bunk and three sleeping on the floor. Judge Scott appended the photograph on the next page to his opinion, describing this as "a typical one-man cell with four inmates." 397 F.Supp. at 32. He found the overcrowded cells "most disturbing to the Court." Id. Judge Scott concluded that the overcrowding "creates violence, brutality, disease, bitterness, and resentment as to both inmates and correctional staff" and that it "tends to perpetuate antisocial behavior and foster recidivism so as to ultimately disserve the rehabilitative goals of the correctional system". 397 F.Supp. at 38. Judge Scott wrote that: "A free democratic society cannot cage inmates like animals in a zoo or stack them like chattels in a warehouse and expect them to emerge as decent, law abiding, contributing members of the community. In the end, society becomes the loser." 397 F.Supp. at 38.

The District Court stated its reluctance, for three years, to "intervene in the overcrowding crisis which has existed in the Florida Prison System", but finally the court determined to issue an injunction because "overwhelming evidence points toward blatant deprivations of the plaintiffs' constitutional rights, which the State of Florida has been unwilling to rectify." 397 F.Supp. at 34. On May 22, 1975, Judge Scott granted plaintiff's renewed application for a preliminary injunction to deal with

APPENDIX

EXHIBIT "A"



13a

overcrowding. He ordered the Division of Corrections (or its successor agency) to reduce the inmate population, or increase prison capacity, in stages so as to reach the level designated by defendants as "emergency capacity" within one year, and the level designated "normal capacity" by December 1, 1976. 397 F.Supp. at 38-39. The Court enjoined the defendants from housing more than one inmate in the one-man cells at Lake Butler, and ordered that each inmate be given a bed upon which to sleep. Id. The Court also denied defendants request for a three-judge court. Id.

The defendants demand for a three-judge district court was made on the fourth day of the trial, May 12, 1975. The plaintiffs opposed the request.[8/] The demand came over two years after the filing of the Second Amended Complaint, and four months after the Amended Pre-Trial Stipulation. Judge Scott thought the defendants' contention about a three-judge court "borders somewhat on the frivolous." 397 F.Supp. at 36. Defendants argued that the preliminary injunction to reduce overcrowding would restrain Section 839.21 of the Florida Statutes which makes it a crime for a jailer to refuse to receive a prisoner lawfully committed to his custody. The district court wrote that plaintiffs had not questioned the constitutionality of this statute, that there was no prosecution or threat of prosecution of defendant Wainwright under the statute, and that "This Court has not and will not require the defendant Wainwright to refuse to accept prisoners lawfully committed to his custody. He may use whatever means within his control, consistent with his constitutional and statutory obligations, to comply with this Court's injunction." 397 F.Supp. at 36.

8/ The United States, as amicus curiae, also opposed the states' argument that a three-judge court was required. See brief for United States as Amicus Curiae, in 5th Circuit, pp. 57-73.

The preliminary injunction was stayed pending appeal, and on January 15, 1976, a panel of the Fifth Circuit affirmed by a vote of 2-1, with Judge Roney dissenting. With respect to the merits of the case the court held that the correctness of the district court's findings was virtually conceded by the pre-trial stipulation. 525 F.2d at 1246-1248. The Court held that the evidence fully justified the preliminary injunction. Id. The majority also rejected the defendants arguments on the three-judge issue and an argument that the district court should have abstained from deciding the case. The Court also approved the remedy ordered and rejected the defendants arguments that the compliance was impossible:

> "It is clear that there is nothing in the trial court's preliminary injunction that cannot be accomplished but for the lack of funds. Optimistically some remedial steps can be taken even without substantial additional expenditures. In any event, the right of the plaintiffs to be secure in their constitutional rights cannot be made dependent upon the action of the state legislature in appropriating additional money, an area which we can all recognize from the course of human experience is a field in which relief too often comes, too little and too late.
>
> "It should be borne in mind that what we are dealing with here is a preliminary injunction, subject to modification at any time by the trial court upon a proper showing by the defendants that such emergency or exceptional circumstances have arisen as to warrant the Court's giving further consideration to the terms of the injunction. Moreover, it should be borne in mind that well before the final date covered by the court's order, the case should be ripe for final adjudication, after which the court's final injunction, if warranted, will be issued, based upon the facts as they then exist."

525 F.2d at 1252.

On rehearing en banc, the Court of Appeals ruled in an opinion by Judge Roney for an 11-3 majority that the relief granted by the district court was beyond the power of a single

district judge under 28 U.S.C § 2281. The majority held that the case "did not start out as a three-judge case", but that when the case became an overcrowding case and the relief needed "stretched beyond" the authority of the Director of the Division of Corrections and required him to violate Florida statutes the three-judge court problem "arises". 539 F.2d at 550-552. The court ruled that if the injunction "is to remain as written, it is beyond the jurisdiction of a single judge". The injunction was then vacated and the case remanded to "permit the district court to grant only such relief against these defendants as they can provide without nullification of state statutes, and to request the convention of a three-judge court if that is deemed appropriate under the circumstances." It should be noted that the en banc majority adopted the panel opinion on the merits and "affirms the district court's refusal to abstain, and the district court's findings of constitutional deprivations in the Florida prison system to the extent that they would support the granting of appropriate single judge relief." 539 F.2d at 549.

The dissenters, Judges Brown, Tuttle and Goldberg, wrote that the majority had inappropriately expanded the requirements for three-judge courts, in a case where "clear and manifest injustice" was being done to plaintiffs, and after Congress had repealed section 2281.

Following the decision of the Court of Appeals, petitioners have filed motions in the trial court seeking leave to add as defendants the Governor and Lieutenant Governor of Florida, the members of the Cabinet, and the Parole and Probation Commission. Another pending motion seeks injunctive relief from overcrowding consistent with the powers of these officials under state law, or in the alternative for temporary injunctive relief from the resident judge pending the convening of a three-judge court. No ruling on these motions has been issued to date.

REASONS FOR GRANTING THE WRIT

I.

The Case Involves Important Questions Which Affect Many Pending Cases.

We believe that the Fifth Circuit's expansive interpretation of 28 U.S.C. §2281 in this case, as well as in a contemporaneous case (e.g. Morales v. Turman, 535 F.2d 864 (5th Cir. 1976), petition for certiorari filed as No. 76-5881 December 16, 1976) presents an issue of sufficient importance to merit plenary review even though §2281 has been repealed by Congress. At first blush one might think that the Fifth Circuit Costello rule would apply to only a few cases. We think that is not the fact. The exact number of cases which will be affected by the Costello rule can never be ascertained in advance because the rule operates in long pending cases and does not come into play until the relief stage of the case, which may not be completed until a great deal of time has passed. Costello would require a three-judge court in any case in which a defendant state official can claim that the injunctive relief to be considered or granted would compel the disregard of a state statute or regulation, regardless of whether the constitutionality of the law or regulation has been decided in the case. Obviously such a rule affects injunctive decrees involving all kinds of constitutional claims. As we will describe below, such arguments have for example been made and rejected in school desegregation cases. See part II, infra. But even limiting consideration to correctional cases Costello may have a broad impact.

In the first place there are a great many pending prison conditions cases and the fact that many are pro se applications

does not necessarily distinguish them from Costello. See for example Sands v. Wainwright, 491 F.2d 417, 424 (5th Cir. 1972), cert. denied sub nom. Guajardo v. Estelle, 416 U.S. 992 (1974). Of a total of 6,341[9] state prisoner civil rights suits pending in all of the district courts on June 30, 1976, there were 771[10] cases which had been pending more than three years, and 577 of the cases are class actions.[11] We have not been able to find out how many of the cases involve requests for injunctive relief. Even if the Costello rule is confined to the Fifth Circuit its impact may be great, because more than a third of the prisoner cases in the nation were in that circuit -- 2,339 cases[12] -- and almost half of the Fifth Circuit cases (1,049 cases[13]) come from the Middle District of Florida where Costello arose.[14] The prisoner petitions pending in the district courts in the Fifth Circuit include 315 class actions.[15] During the Fiscal Year 1976, 619 state prisoner civil rights cases were appealed to the courts of appeals.[16]

In the second place, the impact of Costello is already evident in Mississippi where a nearly six year old prison conditions case has been referred to a three-judge court. In an unreported opinion in Gates v. Collier, which we quote extensively in the note below, Judge Keady asked for the convening

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9/ 1976 Annual Report of the Administrator, p. I-21; see also pp. 93-96.

10/ Id. at p. 88.

11/ Id. at p. 120.

12/ Id. at p. I-21.

13/ Ibid.

14/ On June 30, 1976 there were 474 prisoner cases pending in the Southern District of Texas, 136 in the Eastern District of Texas, 139 in the Northern District of Georgia, and 97 in the Northern District of Texas.

15/ 1976 Annual Report of the Administrator, p. 120.

16/ Id. at p. 67-68.

of a three-judge court under the Costello rule.[17] This happened even though the Mississippi prison conditions issues have been litigated and appealed on numerous prior occasions, Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), affirmed 489 F.2d 298 (5th Cir. 1973); affirmed 501 F.2d 1291 (5th Cir. 1974); 371 F. Supp. 1368 (N.D. Miss. 1973), vacated 522 F.2d 81 (5th Cir. 1974); 390 F. Supp. 482 (N.D. Miss. 1975), affirmed 525 F.2d 965 (5th Cir. 1976); 407 F. Supp. 1117 (N.D. Miss. 1975); and even though the Fifth Circuit held in 1974 that no three judge court was required to consider the merits in Gates. 501 F.2d 1291, 1226-1299.

17/ Gates v. Collier, N.D. Miss. No. GC 71-6-K, Nov. 19, 1976. Judge Keady discussed the issue as follows:

> "Where a situation arises regarding the injunction against enforcing a statute or statutes of statewide effect on the ground of federal unconstitutionality, we become directly confronted with the question of whether the issue is one for resolution by a three-judge court convened pursuant to 28 U.S.C. §§ 2281 and 2284. It is immaterial that the issue of constitutionality of a state statute is put in question because of conflict with the effects of a federal court's injunctive order rather than from the statute's terms. 'A statute does not have to be directly challenged as unconstitutional on its face where the impact of a court order achieves the precise result requiring a three-judge court.' Costello v. Wainwright, 539 F.2d 547, 552 (5th Cir. 1976). On August 12, 1976, Public Law 94-381, 94th Congress, S.537 repealed § 2281 and amended § 2284 to eliminate the requirement of a three-judge court in actions seeking injunctive relief against enforcement of state statutes on ground of the unconstitutionality, with certain exceptions not applicable here. However, by § 7 it was expressly provided 'this act shall not apply to any action commenced on or before the date of enactment.' 15/
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> 15/ The legislative history of the amendment makes it clear that "cases filed prior to the enactment of this bill shall proceed to final disposition under the law existing on the date they were commenced." S. Rep. No. 94-204, U.S. Code Cong. & Admin. News, 94th Cong., 2d Sess. 3173 (1976).

Since the present action was filed long before the three-judge court amendment, and the issues of unconstitutionality of housing conditions and inmate protection have been in litigation since 1971, § 2281 undeniably requires the

If the Costello rule is wrong, as we attempt to demonstrate below, it ought not be dismissed as of little importance based on the repeal of § 2281.

There is of course another dimension of importance of the case. From the point of view of the prisoners in the Florida prison system, this case presents an inexplicable failure of the courts to deal with plain violations of fundamental rights. The dissenting opinion called the decisions "a tragically wrong disposition of the claim of nearly 15,000 Florida state prisoners to be afforded simple humane treatment". 539 F.2d at 552-553. That is an appropriate description of a disposition that vacates an injunction even though a district judge and all fourteen sitting appellate judges agreed unanimously that the Cruel and Unusual Punishment Clause and the Due Process Clause were violated by the deprivation of basic medical care in conjunction with intolerable overcrowding. The propriety of that decision on the merits can hardly be doubted in view of the undisputed facts and settled law. Estelle v. Gamble, __ U.S. __; 45 U.S. Law Week 4023 (November 30, 1976); Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), cert denied 421 U.S. 948 (1975); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Goldsby v. Carnes, 365 F. Supp. 395 (W.D. Mo. 1973) (consent decree); Jones v. Wittenberg, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971) affirmed sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Hamilton v. Love, 328 F. Supp. 1182

17/ (Con't.) convening of a three-judge court to grant permanent injunctive relief striking down statutory provisions which prohibit corrections officials from carrying out the duties imposed upon them by the United States Constitution.

Accordingly, we request the convening of a three-judge court consistent with Costello's holdings and the procedure therein approved."

Judged Keady then issued a temporary restraining order on prison overcrowding under 28 U.S.C. § 2284.

(E.D. Ark. 1971); Inmates v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), affirmed 494 F.2d 1196 (1st Cir. 1974), cert. denied, 419 U.S. 977 (1975); Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2nd Cir. 1975); Rhem v. Malcolm, 507 F.2d 333 (2nd Cir. 1974).

II.

The Decision Below is in Conflict with Aprlicable Decisions of this Court

We believe that the Fifth Circuit has announced a novel and quite unworkable expansion of 28 U.S.C. § 2281. The injunction in Costello was based on a finding and conclusion that overcrowding in the Florida state prison system was unconstitutional because it prevented inmates from getting the essentials of medical care and it endangered their health and their lives. There was never a challenge to the constitutionality of any state statute, and never any decision on the constitutionality of any statute. Indeed the District Judge did not think that his order enjoined the enforcement of any statute.[18] But accepting, arguendo, the Court of Appeals conclusion that the injunction might force Mr. Wainwright to disregard a state law, it is still evident that the injunction was issued upon the ground of the unconstitutionality of the result obtained in the operation of the prisons, rather than upon the ground of the unconstitutionality of any statute. The decision below holds that three judges are required notwithstanding the fact that a state statute is involved in the case only at the level of relief, and the fact that the statutes' constitutionality is unquestioned. Moreover, the Fifth Circuit sees the three-judge requirement as shifting depending upon how the district judge formulates the remedy.

18/ ". . . this Court has not and will not require the defendant Wainwright to refuse to accept prisoners lawfully committed to his custody." 397 F.Supp. at 36. The statement was repeated at 397 F.Supp. 38. The district court thought that means existed within Florida law for Mr. Wainwright to reduce the inmate population. 397 F.Supp. at 35. For example the court pointed to Mr. Wainwright's power to liberalize the procedures for granting inmates an "extra good time allowance" under Section 944.29 of the Florida Statutes. See also Appendix, infra 33A-38A, concerning the defendants' ability to expand prison capacity. Since

The Fifth Circuit held that the district court's order requiring Mr. Wainwright to either reduce the number of prisoners or increase facilities so as to reach the emergency capaci- level and eventually the normal capacity level might require him to ignore a state law which required him to receive all lawfully committed prisoners. Florida Statutes: Section 839.21. The majority ruled that the relief "stretched beyond the limits of the defendants' authority" (339 F.2d at 550), even though the trial judge had twice stated that he would not require Wainwright to refuse to accept lawfully committed prisoners (397 F.Supp. at 36, 38), and the trial judge thought Mr. Wainwright did have state law powers sufficient to control the situation. 397 F.Supp. at 35. Nevertheless, the Fifth Circuit ruled that the order "condemns the operation of Wainwright's statutory responsibility" and that "If the order is to remain as written, it is beyond the jurisdiction of a single judge." 539 F.2d at 552. The court went on to acknowledge that no state statute was challenged as unconstitutional,[19] but thought that the "result reached" by the district court "creates the kind of event § 2281, was designed to protect against." 539 F.2d at 552. The Fifth Circuit made it clear that it thought the requirement of a three-judge court depended upon the relief to be granted by acknowledging that the case "did not start out as a three-judge case" (539 F.2d at 550),

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18/(Cont'd.) Florida statutes prohibited "any cruel or inhuman treatment of any prisoner by neglect or otherwise" (Florida Statutes Section 944.36) the district court orders might be seen as entirely consistent with, rather than opposed to, the Florida legislative scheme.

19/ The court said "A statute does not have to be directly challenged as unconstitutional on its face where the impact of a court order achieves the precise result requiring a three-judge court." 539 F.2d at 552.

and by framing a remand order which even now, permits the single district judge to frame relief for the constitutional violations so long as such relief does not nullify state statutes (539 F.2d at 552). Thus the district judge was directed to convene a three-judge court "if that is deemed appropriate under the circumstances" (Ibid.).

We submit that the decision below is in conflict with the principles set forth in this Court's decisions in Phillips v. United States, 312 U.S. 246, Ex Parte Bransford, 310 U.S. 354, and Swift & Co. v. Wickham, 382 U.S. 111. See also Butler v. Dexter, 425 U.S. 62. In those cases this Court held that 28 U.S.C. § 2281 did not require a three-judge court where a state statute was enjoined, if the injunction was not issued "upon the ground of the unconstitutionality of such statute." 28 U.S.C. § 2281.

In Phillips a court restrained a governor's lawless use of military power to interfere with the construction of a dam by the United States. This Court held that no three-judge court was required since the case did not involve an attack on the state laws which conferred upon the Governor the power to declare martial law, but only involved the misuse of his authority. The Court noted that the "crux" of Section 2281 was "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy" 312 U.S. at 251. The opinion pointed out that the United States did not impugn the validity of the laws relied upon by the Governor to support his actions (Id. at 252.) and went on to state the following principles, which seem applicable to Costello:

> Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of §226 [now 28 U.S.C. §2281]. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a "statute", within the meaning of § 266, is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness. As Mr. Justice Cardozo said of a related problem affecting the business of the federal courts, "we do not travel back so far." Gully v. First Nat. Bank, 299 U.S. 109, 116, 81 L.ed 70, 74, 57 S. Ct. 96.
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> On its face, §266 precludes a reading which would bring within its scope every suit to restrain the conduct of a state official whenever, in the ultimate reaches of litigation, some enactment may be said to authorize the questioned conduct.
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> * * *
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> In other words, the complainant must seek to forestall the demands of some general state policy, the validity of which he challenges. 312 U.S. at 252-253.

If the crux of Section 2281 is procedural protection against improvident doom of a state legislative policy, then we ought to inquire what legislative policy is at stake in Costello. To be sure, the Florida statutes have permitted the result complained of by petitioners, but there is no particular Florida statute which mandates the unconstitutional overcrowding of the prisons or which is affronted by the district court's injunction that the prisons be operated within their capacities. The Costello injunction does not doom any policy legislated by Florida

statutes.

The Eighth Circuit applied the principle of Phillips to find no need for a three-judge court where Little Rock school officials were enjoined from leasing Central High School for private segregated operation (Aaron v. Cooper, 261 F.2d 97, 105-106 (8th Cir. 1958)) and where the Governor was enjoined from using the national guard to block school desegregation under court order (Faubus v. United States, 254 F.2d 797 (8th Cir. 1958)). The Eighth Circuit decisions conflict in principle with the Fifth Circuit's Costello decision. See also the Fourth Circuit decision holding that no three-judge court was required to enjoin school segregation even though a state pupil placement law was interposed in defense. School Board of City of Newport News v. Atkins, 246 F.2d 325 (4th Cir. 1957), cert. den. 355 U.S. 855 (1957).

In Ex Parte Bransford, 310 U.S. 354, the Court held that a three judge court was not required to consider a suit involving local taxation of a national bank because the injunction against the taxes was not sought upon the ground of the unconstitutionality of the state law. Insofar as Bransford involved an attempt to tax property which was exempted by federal statute it was said to concern the superiority of federal over state laws under the Supremacy Clause, as distinguished from the "constitutionality" of the state enactment. Insofar as Bransford involved a claimed discriminatory misapplication of the local tax law by assessors the Court also held that no three-judge court was required. "Such assessments, if made and if invalid, are so because of a wrong done by officers under the statute rather than because of the requirement of the statute itself."

Bransford, supra, 310 U.S. at 359. The Court wrote:

> It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction.
> (310 U.S. at 361; footnotes omitted)

In Costello as in Bransford it is the result obtained by the use of official powers which is attacked as unconstitutional. The injunction regulates the conditions within the prisons, not the Florida statute law. The conditions in the prisons which are sought to be regulated in this case are not directly attributable to any particular Florida statute. As the Court in Bransford said:

> Even where the statute is attacked as unconstitutional, § 266 is inapplicable unless the action complained of is directly attributable to the statute. There is no indication that Congress sought by § 266 to have every attack on the constitutionality of a state statute determined by a three-judge court.
> (310 U.S. at 361-362; footnote omitted)

Last term in Butler v. Dexter, 425 U.S. 62, the Court held that a three-judge court was not required where state officials acted unconstitutionally, using a statute as a pretext, since the case would not present any substantial question concerning the constitutionality of that statute. The court relied on Phillips and Bransford, supra, as well as Bailey v. Patterson, 369 U.S. 31. In

Costello as in Butler and Bailey, supra, there is no substantial question concerning the constitutionality of any state statute. It is quite evident from a reading of the opinions below in Costello that the merits were determined by testing the conditions of the prisons against the requirements of the Constitution, but that there was no process of testing any state statute against the commands of the Eighth or Fourteenth Amendments.

In Swift & Co. v. Wickham, 382 U.S. 111, the Court held that three judge courts are not required in Supremacy Clause cases involving federal-state statutory conflicts. The Court decided that in Section 2281 the phrase "upon the ground of the unconstitutionality of such statute" should be read to confine the three-judge court requirement to those cases where the injunction against a state statute depends "directly upon a substantive provision of the Constitution, leaving cases of conflict with a federal statute (or treaty) to follow their normal course in a single-judge court." 382 U.S. at 127.

The Fifth Circuit's Costello rule is based on an assumption, which we accept arguendo, that there is a conflict between the district court's remedial decree and one or more state statutes. We submit that this kind of conflict is akin to the Supremacy Clause issues in Swift and Bransford, supra. If Mr. Wainwright was ordered to accomplish a result which can be accomplished only if he ignores state law, the state law was overridden because of the supremacy of the district court's remedial power to enforce the Constitution. Such an incidental and probably temporary effect on state law, does not constitute an injunction restraining the enforcement of the law "upon the ground of the unconstitutionality of such statute." 28 U.S.C. §2281.

A number of federal courts have issued remedial orders which had the arguable effect of overriding state laws. In a number of the cases the three judge problem is not discussed, but it was dealt with by Judge Merhige in the Richmond, Virginia school desegregation case involving the question of interdistrict relief. Bradley v. School Board of City of Richmond, 324 F. Supp. 396 (E.D. Va. 1971), subsequent injunction, 338 F. Supp. 67 (E.D. Va. 1972), reversed on other grounds, 462 F.2d 1058 (4th Cir. 1972), affirmed by equally divided court, 412 U.S. 92 (1973).

Judge Merhige found no three judge court necessary because the validity of the state law was not in question and its possible disregard was merely a remedy for a constitutional violation. 324 F. Supp. at 400.[20/] Judge Merhige pointed to examples of similar rulings in other courts, e.g. United States v. Duke, 332 F.2d 759 (5th Cir. 1964) (voting rights) and Haney v. County Board of Education of Sevier County, 429 F.2d 364 (8th Cir. 1970) (school desegregation). The Seventh Circuit approved an injunction which set aside a state law for remedial purposes in Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827, 830 (N.D. Ill. 1972), affirmed 480 F.2d 210 (7th Cir. 1973), cert. den. 414 U.S. 1144 (1974). See also United States v. Greenwood Municipal Sep. School Dist., 406 F.2d 1086, 1094 (5th Cir. 1969) ("local teacher hiring statutes may not be interposed to frustrate a constitutional mandate."), and United States v. Board of Ed. of City of Bessemer, 396 F.2d 44, 51 (5th Cir. 1968) (similar).

The United States, as amicus curiae in the court below, argued quite persuasively that cases such as United States v. Duke, supra, where a court used equitable powers to "freeze" or temporarily

20/ The three judge court issue was argued in the briefs before the Fourth Circuit, but was not mentioned in the opinion of that Court. Bradley, supra, 462 F.2d 1058.

suspend enforcement of a statute without holding it unconstitutional ought not be treated as three judge cases. The United States also argued that the need for three judges "should be determined at the outset of litigation ... not in its midst." Brief of United States, p. 71. The Court in Swift & Co. v. Wickham, supra, 382 U.S. at 124, pointed to the purpose of section 2281 to expedite and not delay important litigation. But the Fifth Circuit's Costello rule will invariably delay litigation. In complex cases where the remedy stage extends for a period of years or months, judges will often experiment with remedies, and choose remedies which trench upon state law or violate state laws as remedies of last resort after other efforts have failed. A doctrine such as Costello, which requires a three judge court to consider the entire case including liability issues ab initio, requires a duplication of effort which is quite at war with the purpose to expedite such cases. We submit that cases of conflict between the federal remedial power and state statutes should be governed by the doctrine of Swift & Co. v. Wickham, 382 U.S. 111, and treated as essentially Supremacy Clause cases which do not involve the constitutionaltity of state laws within the meaning of section 2281.

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III

The Repeal of Section 2281 Should Preclude the Convening of A New Three Judge Court in a Case Which Was Properly Commenced Before A Single Judge.

After the en banc argument of this case but before decision, the Congress on August 12, 1976, enacted Public Law 94-381, repealing 28 U.S.C. §2281. Section 7 of Public Law 94-381, provides that the act "shall not apply to any action commenced on or before the date of enactment". The en banc opinion of the Court of Appeals did not mention the repeal of section 2281, but proceeded to decide the case on the assumption that statute was fully applicable. The dissenting judges did not disagree that section 2281 was applicable in view of section 7, which they called a "savings clause", but they stated that expansion of section 2281 was unwarranted "with such a clear indication of Congressional purpose to abolish three-judge courts in this type of litigation completely." 539 F.2d at 554.

We submit that notwithstanding the so called savings clause, the Court of Appeals should have held section 2281 inapplicable to this case because of the principle "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of City of Richmond, 416 U.S. 697, 711; Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268; United States v. Schooner Peggy, 1 Cranch 103.

We believe that properly construed there is no legislative direction that section 2281 should continue to apply after its repeal in a case such as Costello which was properly commenced before a single judge in 1971, and which only belatedly is argued

to require three judges in remedial proceedings which will resume and continue after the repeal of section 2281. A decision that Section 2281 is inapplicable to Costello would be consonant with the Congressional purpose to relieve the burden of three judge courts, and remove procedural uncertainties. These purposes are stated in the Senate Report:

> "There are four major reasons for enacting this legislation which would eliminate the requirement of three-judge courts in all cases except those involving reapportionment or where required by congressional enactment. They are: (1) to relieve the burden of three-judge court cases, which have increased in number from 129 in 1963 to 320 in 1973, causing a considerable strain in the workload of Federal judges; (2) to remove procedural uncertainties that exist under the present ambiguous three-judge court practices; (3) because statutory and rules changes have eliminated the original reasons for the establishment of three-judge courts; and (4) because decisional law has provided its own safeguards against precipitous injunctive action by Federal judges."
> (S.Rep. No. 94-204, U.S. Code Cong. & Admin. News, 94th Cong. 2nd Sess. 3162-3163.)

The legislative history contains no explanation[21] of section 7, except the following statement in the section-by-section analysis:

> Section 7. - This section provides that the act shall not apply to any action commenced on or before the date of enactment. It is merely added to make clear that cases filed prior to the enactment of this bill shall proceed to final disposition under the law existing on the date they were commenced.

Section 7 is understandable in view of the principle that the three-judge court requirement of section 2281 was a jurisdictional limitation on the power of the courts. Section 7 would

21/ There is no further explanation of the savings clause in the House Report, the hearings, or the floor debate. See House Report No. 94-1379, July 30, 1976 [To accompany H.R.6150]; Hearings Before the Subcommittee on Improvement in Judicial Machinery, Senate Judiciary Committee, 92nd Cong. 2nd Sess. on S.1876, Part 2; Hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, 93rd Cong. 2nd Sess. on S.271, Serial No. 27; Cong. Record June 20, 1975, pp. S11111-11112; Cong. Rec. July 30, 1976, p.H8102; Cong. Rec. Aug. 2, 1976, pp. H8143-8145; Cong. Rec. June 14, 1973; pp. S 19557-19558.

provide a simple effective date which would not disrupt the jurisdiction of three-judge courts already considering pending cases. Cases already before three judges would "proceed to final disposition." But there is no indication that Congress in enacting Public Law 94-381, contemplated the complications which might be caused by the Fifth Circuit's Costello doctrine, which was announced subsequent to the congressional enactment. Congress had no reason to expect that following the repeal new three-judge courts would be ordered in four and six year old cases (as in Costello and Gates v. Collier, supra) unless they were improperly commenced before a single judge. But, the Costello rule requires a three-judge court at the remedial stage of the case. The Fifth Circuit has acknowledged that the Costello case was properly commenced[22] before a single judge court, and only belatedly and conditionally has come to require a three judge court. 539 F.2d at 550, 552.

This Court should apply the Bradley-Thorpe-Schooner Peggy line of decisions, supra, to avoid a plain frustration of the Congressional policy of abolishing three-judge courts for this type of case. Congress had no reason to expect a new judicially created doctrine would expand section 2281 in such a way as to create an indeterminate number of new three-judge courts far into the future and long after August 12, 1976, the date of repeal. The Congressional policy will be best served by a rule, which limits the applicability of Section 2281 to cases which were or should have commenced before three-judge courts in accordance with three-

22/ The Fifth Circuit said of Costello, that "This case did not start out as a three-judge case". 539 F.2d at 550.

judge court practice as it existed on August 12, 1976. The Fifth Circuit's subsequent expansion of the three-judge practice, in Costello, should yield to the Congressional policy expressed in Public Law 94-381.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed insofar as it vacated the injunction issued by the district court, and the case remanded for further proceedings in accordance with the decision of the Court of Appeals affirming the order of the district court on the merits of the cause.

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